



# Department of Justice

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## **DEPARTMENT OF JUSTICE STATEMENT ON THE CLOSING OF THE VERMONT HOME HEALTH INVESTIGATION**

WASHINGTON, D.C. - The Department's Antitrust Division issued the following statement today after the Department announced the closing of its investigation of an alleged territorial allocation among Vermont's 12 Medicare-certified home health agencies:

As a result of a new state law, the Home Health Services Act of 2005, the Department has decided not to proceed with its investigation. "The Department believes that competition motivates providers to improve quality to attract customers and referral sources, invest in new technology, and train qualified staff. Our investigation demonstrated that competition has delivered these benefits to customers of home health agencies where state governments have not intervened with the market, as Vermont has done here. Moreover, while it is the Division's position that a state law such as this one cannot retroactively immunize illegal conduct, the Department is not further pursuing the preexisting territorial allocations among the Vermont home health agencies because Vermont's new legislation provides some state government oversight of the home health agencies, authorizes redrawing the territories to allow for additional competition and creates mechanisms for the state to supervise the agencies."

Given that Vermont has chosen to pursue this regulatory approach, the Department is urging Vermont's state officials to exercise close oversight under the Act and to critically evaluate the agencies' arguments for maintaining the status quo and keeping out competition. The Division also is urging state officials to examine the objective measures of performance - such as client outcomes and reliability of service - and to consider how competitive incentives can be undermined by increased regulation. Finally, the Division is urging the state to take steps to foster competition among providers in contracting for the private delivery of home health services.

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(Background information is attached.)

## **DEPARTMENT OF JUSTICE ANTITRUST DIVISION STATEMENT REGARDING THE CLOSING OF ITS VERMONT HOME HEALTH INVESTIGATION**

The Division's investigation showed that the longstanding territorial allocation among the twelve Medicare-certified home health agencies in Vermont resulted from private agreement, not any provision of state law.

The fact that the agencies allocated territories over three decades ago partly as the result of state grants does not justify the agencies refraining from competing today. The Vermont home health market has grown substantially, now with revenues of approximately \$100 million per year, approximately 80% of which are derived from Medicare and Medicaid programs. Since their formation, the home agencies have grown in revenues and numbers of clients, and some agencies have greatly expanded their service areas by merging with other agencies. Despite these substantial changes, the agencies have continued to refrain from competing with each other. And historically no new home health competitors have been allowed to enter the market, under Vermont's restrictive Certificate of Need (CON) regulations. Although one state commission has acknowledged that Vermont's home health agencies do not compete, state law did not limit competition.

### **The Likely Effects of the Territorial Allocation**

Competition benefits consumers by motivating firms to provide higher quality services, innovate, operate efficiently, and reduce prices. Competition motivates providers of healthcare services, and home health services in particular, just as in other industries. For example, in states where home health agencies compete with each other, home health agencies invest in technology to attract consumers. In states where consumers have choices, home health agencies compete to satisfy different consumer preferences and perceptions of quality. Not all home health agencies are alike in terms of outcomes and reliability, including for example the number of patient visits for which the agencies fail to appear. Unfortunately, because consumers in Vermont have not been able to choose home health agencies outside their assigned territory, the agencies have had no competitive incentives to improve their services. During the investigation, the Division heard many credible complaints from consumers frustrated by their inability to choose a different provider.

Competition also lowers prices. The average prices charged by the Vermont home health agencies that do not face competition are significantly higher than the prices insurers pay outside Vermont where competition typically exists.

### **The Home Health Act of 2005**

Vermont, however, now has chosen to pursue a regulatory approach. The Home Health Act of 2005 designates a territory for each of the existing agencies. The Commissioner of Vermont's Department of Aging and Independent Living (DAIL) must review the territories every four years. The law requires that DAIL approve certain agreements among the agencies, including nonexclusive statewide contracts with insurers. The law mandates that DAIL collect comprehensive data on agency performance and use the data to assess whether an agency should

be fined for performance problems or have its exclusive territory redrawn or opened to competition. Given these provisions, the Division has determined not to proceed with its investigation at this time.

For the benefit of Vermont home health patients, the Division urges Vermont's state officials to exercise close oversight under the Act and to critically evaluate the agencies' arguments for maintaining the status quo and keeping out competition. In assessing whether to allow new competitors, the Division also urges state officials to examine the objective measures of performance – such as client outcomes and reliability of service – and to consider how competitive incentives can be undermined by increased regulation. Competition motivates providers to improve quality to attract customers and referral sources, invest in new technology, and train qualified staff.

The Home Health Act provides some limited avenues for competition. The Division is encouraged by the recent decision to allow a for-profit home health agency competitor to enter the market in Vermont. To increase the benefits of competition for consumers, the Division is urging state regulators to continue to certify new entrants through the CON process and promote competition among existing providers by allowing overlapping territories. The Division also is urging the state to foster competition among providers in contracting for the private delivery of home health services.

The Division provides this statement pursuant to its policy on the issuance of investigation closing statements. This statement is limited by the Division's obligation to protect the confidentiality of certain information obtained in its investigations. As in most of its investigations, the Division's evaluation has been highly fact-specific, and many of the relevant underlying facts are not public. Consequently, readers should not draw overly broad conclusions regarding how the Division is likely in the future to analyze other collaborations or activities, or transactions involving particular firms. This statement does not bind the Division in any future enforcement action. The Division's statement on issuance of closing statements is available at: <http://www.usdoj.gov/atr/public/guidelines/201888.htm>